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JAMES R. BROWNING, Clerk

No. [redacted]/31

IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

AGNES TOOMER, *Petitioner*

v.

THE UNITED STATES OF AMERICA, *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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AGNES TOOMER, *Petitioner*

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THE UNITED STATES OF AMERICA, *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

The petitioner, Agnes Toomer, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit affirming the judgment of conviction entered by the United States District Court for the Western District of Pennsylvania.

OPINION BELOW

The opinion of the Court of Appeals, not yet reported, is reprinted as Appendix A hereto. There was no opinion in the District Court.

JURISDICTION

The judgment of the Court of Appeals was entered May 8, 1961 and is reprinted as Appendix B hereto.

The jurisdiction of this Court is invoked under Title 28 U.S.C. § 1254(1).

QUESTION PRESENTED

Are the declarations of a conspirator admissible against an alleged co-conspirator in the absence of independent proof that the alleged co-conspirator was present when the declarations were made and had joined the conspiracy?

Expressed in terms of the case, a conspirator made a long distance telephone call allegedly to petitioner to arrange the transportation of a girl in interstate commerce for the purpose of prostitution. The girl was present when the call was made and testified as to what she overheard the conspirator say on the telephone. Were such declarations admissible against petitioner in the absence of independent proof as to the identity of the person at the other end of the line and that such other person had joined the conspiracy?

STATUTES INVOLVED

TITLE 18 U.S.C.

> "§ 371. *Conspiracy to commit offense or to defraud United States.*
>
> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of

the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both . . ."

"§ 2422. *Coercion or enticement of female.*

Whoever knowingly persuades, induces, entices, or coerces any woman or girl to go from one place to another in interstate or foreign commerce, or in the District of Columbia or in any Territory or Possession of the United States, for the purpose of prostitution or debauchery, or for any other immoral purpose, or with the intent and purpose on the part of such person that such woman or girl shall engage in the practice of prostitution or debauchery, or any other immoral practice, whether with or without her consent, and thereby knowingly causes such woman or girl to go and to be carried or transported as a passenger upon the line or route of any common carrier or carriers in interstate or foreign commerce, or in the District of Columbia or in any Territory or Possession of the United States, shall be fined not more than $5,000 or imprisoned not more than five years, or both."

STATEMENT

Petitioner was convicted under Title 18 U.S.C. § 371 of conspiring with others to commit the offense of causing a woman to be transported by common carrier in interstate commerce for the purpose of prostitution, in violation of Title 18 U.S.C. § 2422.

The indictment contains two counts. Count I charges Joseph F. Frank and Joseph C. Stead, Jr., with the substantive offense proscribed by § 2422. In Count II the appellant, Agnes Toomer, is charged jointly with Frank and Stead with conspiring to commit the substantive offense charged in Count I. Frank pleaded

guilty and testified on behalf of the government; Stead was tried and convicted on both counts.

Frank and Stead were cab drivers in Pittsburgh, Pennsylvania. Frank met Patricia Ann Kister in the latter part of 1958 while she was working in a cafeteria and became friendly with her. At Frank's inducement the girl agreed to enter into prostitution if a suitable location could be found in the tri-state area of Pennsylvania, Ohio and West Virginia. In March of 1959 the girl was brought to Stead's apartment in Pittsburgh where she remained for two or three days while Stead and Frank attempted to find a place for her to work. The girl testified that she overheard a phone call made by Stead from his apartment to a woman by the name of "Agnes" in Wheeling, West Virginia, at which time arrangements purportedly were made for the girl to go to work in Wheeling. She could not hear what was said at the other end of the line. Two days later Frank took the girl to a bus station in Pittsburgh, bought her a ticket and placed her on a Greyhound Bus for Wheeling. She arrived at Wheeling and took a cab to the 26th Street Hotel, which was a known house of prostitution operated by the appellant, Agnes Toomer. She worked there as a prostitute for several days until she decided she would like to return home. Frank and Stead came to Wheeling and met her at the hotel. She turned her earnings over to them and they arranged her transportation back to Pittsburgh.

REASONS FOR GRANTING THE WRIT

By affirming a conspiracy conviction based solely on the alleged declarations of a conspirator, without independent proof that petitioner was present when the declarations were made and had joined the conspiracy, the Court of Appeals has decided a federal question in a way in conflict with the applicable decisions of this Court

This Court has said that the declarations of a conspirator "are admissible over the objection of an alleged co-conspirator, who was not present when they were made, only if there is proof aliunde that he is connected with the conspiracy." *Glasser* v. *United States*, 315 U.S. 60, at page 74, 86 L. Ed. 680, at page 701, 62 S. Ct. 457. The declarations with which we are concerned are the statements attributed to Stead during his alleged phone call to appellant which the girl claims to have overheard. Testifying in their own defense Stead denied making the call and appellant denied receiving it. The fact that the evidentiary conflict is presumably settled by verdict has no bearing upon the admissibility of the evidence. The declarations were offered for the purpose of proving the identity of appellant, as the person with whom Stead was speaking, and to prove that she joined the conspiracy during the course of the conversation. They were, thus, offered for the purpose of proving the very facts upon which their admissibility depended. To justify their admission the facts were assumed. The declarations cannot serve as such proof, for "Otherwise," as the late Mr. Justice Murphy so aptly put it, "heresay would lift itself by its own boot straps to the level of competent evidence." *Glasser* v. *United States*, id. There was no other proof to connect appellant with the conspiracy. The evil was pointed out by Mr. Justice Jackson when he said, ". . . a conspiracy often is proved by evidence that is admissible only upon

assumption that conspiracy existed." Concurring opinion, *Krulewitch* v. *United States*, 336 U.S. 440, at page 453, 93 L. Ed. 790, at page 799, 69 S. Ct. 716. And, since the appellant at no time entered the State of Pennsylvania, jurisdiction of her person depended upon the same assumptions.

The Court of Appeals neatly disposed of the question of admissibility by brushing it aside. The fact that the girl went to Wheeling and worked for appellant as a prostitute apparently satisfied the Court that prior arrangements had been made. Reasoning backward from the end result is a dangerous practice that should not be condoned. The Eighth Circuit recognized the point when it held that an accused could not be convicted of causing women to be transported in interstate commerce for purposes of prostitution merely because she operated a house to which women were accustomed to come from other states. *McGuire* v. *United States*, 152 F. 2d. 577. The Court of Appeals simply avoided coming to grips with the single issue upon which the conviction was based and declined to consider the question of admissibility. Appellant has the right to have the question fairly decided.

Here, the government was after the two men, Frank and Stead, who arranged to transport the girl. It got them on the substantive count. Appellant, caught up in the dragnet of conspiracy, got worse than their fate to the extent of a maximum sentence of five years. Again we borrow from Mr. Justice Jackson's concurring opinion in *Krulewitch* v. *United States*, supra, and his admonition is most appropriate:

> "And I think there should be no straining to uphold any conspiracy conviction where prosecution for the substantive offense is adequate and the

purpose served by adding the conspiracy charge seems chiefly to get procedural advantages to ease the way to conviction." (336 U.S. at page 457, 93 L. Ed. at page 801.)

CONCLUSION

For the foregoing reasons this petition for a writ of certiorari should be granted.

Respectfully submitted,

GILBERT S. BACHMANN,
Attorney for Petitioner.

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 13,499

UNITED STATES OF AMERICA

v.

JOSEPH F. FRANK, JOSEPH C. STEAD, JR., and AGNES TOOMER,

AGNES TOOMER,

Appellant

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Argued April 18, 1961

Before GOODRICH, KALODNER and STALEY, *Circuit Judges.*

Opinion of the Court

(Filed May 8, 1961)

By GOODRICH, *Circuit Judge.*

This is an appeal from a conviction of the defendant under the so-called "Mann Act," 18 U.S.C. § 2422. The indictment upon which the present defendant and others were indicted contained two counts. One was for the substantive offense; the other was for conspiracy. The defendant was prosecuted and convicted upon the conspiracy count only.

Various objections are made to the conviction. It is argued that the indictment is defective since it does not set out an agreement on defendant's part. There is no

merit to this point. An express agreement is not necessary to prove conspiracy. Judge Staley, in a recent case in this Court, pointed out that criminal plottings are spawned in secrecy. "[I]t is an axiomatic principle of law that a conspiracy charge may be sustained on circumstantial evidence alone." *United States* v. *Migliorino*, 238 F.2d 7, 9 (3d Cir. 1956).

Defendant's counsel makes a very strong argument to the effect that the indictment is duplicitous. The first count charges a substantive offense only and the present defendant is not involved. Count two charges conspiracy and then adds some language which certainly is open to the construction that it charges the substantive offense of transportation in interstate commerce. We have a very strong statement on the duplicity point in *United States* v. *Richie*, 222 F.2d 436 (3d Cir. 1955). The court points out that the objection is waived unless there is a motion prior to trial to dismiss the indictment. Appellant endeavors to meet that decision by saying that the trial court here did not give any consideration to the motion to dismiss because it was not filed before arraignment and did not see fit to exercise its discretion to permit the motion to be argued within a reasonable time after arraignment. Fed. R. Crim. P. 12 (b)(3). But the force of the argument is completely lost because the motion to dismiss did not include any objection on the basis of duplicity. In this case the trial judge pointed out to the jury the difference between the two counts in the indictment, and further told them clearly that in considering the conspiracy count they should consider each defendant's case separately. There was no confusion.

In its list of overt acts the Government includes one very remarkable charge that "On or about March 25, 1959, at Pittsburgh, in the County of Allegheny, in the Western District of Pennsylvania, said Patricia Ann Kister prac-

ticed prostitution at the 26th Street Hotel, Wheeling, West Virginia." We may disregard the allegation of this extraordinary feat because there are five overt acts charged and only one has to be proved. *Hall* v. *United States*, 109 F.2d 976 (10th Cir. 1940). This was done.

The chief point in the case concerns a telephone call made from the defendant Stead from his apartment in Pittsburgh to one "Agnes, 26th Street Hotel, Wheeling, West Virginia." Kister was the chief Government witness and she was the one who was concerned in the transaction. But such a person is not a co-conspirator even though a willing object of interstate transportation for purposes of prostitution. *Gebardi* v. *United States*, 287 U.S. 112 (1932).

Kister testified that in her presence and hearing in Stead's apartment in Pittsburgh a person-to-person call was made by Stead to "Agnes," 26th Street Hotel, Wheeling, West Virginia. This "Agnes" is the defendant here. Kister could not hear what was said at the other end of the line in Wheeling but could hear and did testify to what Stead himself said. As a result of the conversation, according to the witness, arrangements were made for her to travel to Wheeling, West Virginia, and there serve as a prostitute in the defendant's "hotel." This arrangement was carried out; she did take the trip and did so serve.

The case presents on its facts a situation very similar to *Cwach* v. *United States*, 212 F.2d 520 (8th Cir. 1954). In that case the report of the telephone conversation was corroborated by the supporting evidence from the telephone company that the call was made at the time and place that it was supposed to have been made to the person who was claimed to have received it. Such corroboration would have made the Government's case easier here. But the jury was satisfied with what was submitted to it. There were corroborative facts and evidence supporting

Kister's testimony. The judge submitted the case fairly to the jury. There was no error.

The judgment of the district court will be affirmed.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 13,499

UNITED STATES OF AMERICA

v.

JOSEPH F. FRANK, JOSEPH C. STEAD, JR., and AGNES TOOMER,

AGNES TOOMER,

Appellant

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Present: GOODRICH, KALODNER and STALEY, *Circuit Judges.*

Judgment

This cause came on to be heard on the record from the United States District Court for the Western District of Pennsylvania and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this case be, and the same is hereby affirmed.

Attest:

HARRIET G. HUMPHRYS
Chief Deputy Clerk

SUPREME COURT, U. S.

JUN 28 1961

JAMES R. BROWNING, Clerk

No. 131

In the Supreme Court of the United States

OCTOBER TERM, 1961

AGNES TOOMER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

ARCHIBALD COX,
Solicitor General,

[illegible],
Assistant Attorney General,

[illegible],
[illegible],
[illegible],
Department of Justice,
Washington 25, D. C.

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In the Supreme Court of the United States

OCTOBER TERM, 1961

No. 131

AGNES TOOMER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. 1a-4a) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on May 8, 1961. The petition for a writ of certiorari was filed on June 6, 1961. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether in a prosecution for conspiracy the trial court erred in admitting testimony about a telephone call made by a co-conspirator, in the presence of the witness, to a person circumstantially shown to have been the petitioner.

STATEMENT

Petitioner and two others were convicted in the Western District of Pennsylvania of conspiring to transport a woman in interstate commerce for the purpose of prostitution, in violation of 18 U.S.C. 2422. Petitioner was sentenced to five years' imprisonment and a fine of $1,000.

The petitioner, Agnes Toomer, operated a well known house of prostitution in Wheeling, West Virginia, known as the 26th Street Hotel (Pet. 4). At the inducement of co-conspirators Frank and Stead, one Patricia Ann Kister agreed to enter into prostitution if a suitable location could be found in Pennsylvania, Ohio or West Virginia (*ibid.*). Miss Kister testified that in March 1959, Stead, at whose apartment in Pittsburgh she was then staying, placed a person-to-person telephone call to "Agnes at the 26th Street Hotel" in Wheeling (R. 26a-27a).[1] Stead described Miss Kister, asked if Agnes "had a room for a girl" and if Miss Kister "could come down," and stated that she "would be down" (R. 27a-28a). The next day Frank took Miss Kister to a bus sta-

[1] "R" refers to appellant's appendix in the court of appeals and "Tr." to the trial transcript. We have lodged the latter with the Clerk.

tion, bought her a ticket for Wheeling, and gave her a piece of paper on which was written "Agnes' Hotel * * * Agnes' name, 26th Street Hotel and the address and the name I was supposed to use" and the telephone number there (Pet. 4; Tr. 14-15, 104). Upon arriving in Wheeling, Miss Kister went to the petitioner's 26th Street Hotel and worked as a prostitute there for five or six days, eventually turning over her earnings to Frank and Stead (Pet. 4).

ARGUMENT

Petitioner contends that it was improper to admit against her Miss Kister's testimony as to the telephone call Stead made to "Agnes" at the 26th Street Hotel. Petitioner invokes the hearsay rule that declarations of a conspirator are not admissible against one not present unless there is proof *aliunde* that such absent person was a member of the conspiracy. *Glasser* v. *United States*, 315 U.S. 60. The rule is inapplicable here, however, because Miss Kister's testimony as to the placing of the telephone call and Stead's statements during the conversation was not hearsay. The evidence was introduced not to prove the truth of what Stead said, but to prove that he had made the telephone call to "Agnes" at the 26th Street Hotel, and had arranged for Miss Kister to work there as a prostitute. Miss Kister was present during the entire call, and her testimony about it was direct evidence.

The only remaining link necessary to establish petitioner's participation in the conspiracy was to

show that the person to whom Stead spoke when he called "Agnes" was the petitioner Agnes Toomer. There was ample evidence which justified the jury in concluding that Stead had spoken to the petitioner when he made arrangements for Miss Kister to work as a prostitute at the 26th Street Hotel. Stead placed a person-to-person call to the petitioner; Miss Kister was put on a bus for Wheeling, West Virginia, and given a note with the name "Agnes" and the petitioner's hotel address on it; and petitioner was expecting Miss Kister and provided accommodations for her to engage in prostitution. The identity of the person with whom the conversation was had may be established by circumstantial evidence. *Cwach* v. *United States*, 212 F. 2d 520 (C.A. 8); *United States* v. *Bucur*, 194 F. 2d 297, 303-304 (C.A. 7); *Andrews* v. *United States*, 78 F. 2d 274 (C.A. 10).

In any event, if Miss Kister's testimony about the telephone conversation is viewed as hearsay, the additional evidence described in the preceding paragraph was sufficient proof *aliunde* that petitioner was a member of the conspiracy to justify admission of the testimony against her.

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be denied.

ARCHIBALD COX,
Solicitor General.

HERBERT J. MILLER, JR.,
Assistant Attorney General.

BEATRICE ROSENBERG,
BRUNO COLAPIETRO,
Attorneys.

JUNE 1961.

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